SELAMAN SDN BHD & ANOR v. PINANG SARI SDN BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-1293-08-2015]
14 JULY 2017

CONTRACT: *Time – Late completion – Share sale agreement – Whether time of essence of agreement – Intention of parties – Whether to be determined by conduct and dealings of parties – Whether time no longer of essence once time for completion allowed to pass – Whether vendor gave reasonable notice of intention to abandon agreement – Whether termination of agreement lawful*

CONTRACT: *Termination – Validity – Share sale agreement – Whether time of essence of agreement – Intention of parties – Whether to be determined by conduct and dealings of parties – Whether vendor gave reasonable notice of intention to abandon agreement – Whether agreement terminated peremptorily – Whether termination lawful – Whether damages adequate remedy – Whether purchaser entitled to specific performance*

The second appellant ('the second defendant'), a private limited company and the registered proprietor and beneficial owner of two pieces of land ('the lands'), was a wholly owned subsidiary of the first appellant ('the first defendant'). The first defendant held the entire issued and paid up shares capital comprising of one million ordinary shares ('the shares') in the second defendant and had ultimate control over the management and affairs of the second defendant including the lands. Pursuant to a share sale agreement ('SSA'), the respondent ('plaintiff') agreed to purchase and the first defendant agreed to sell all the shares according to the terms and conditions contained therein. Upon the first payment of 2% of the purchase price pursuant to cl. 3.3(a) of the SSA by the plaintiff, the parties entered into the SSA on 23 October 2013. On 4 November 2013, the plaintiff paid the second payment pursuant to cl. 3.3(b) of the SSA and proceeded to register private caveats over the lands. The third payment fell due on 15 February 2013. However, on the plaintiff's request, the date for payment of the third payment was extended three times by the first defendant and the final extension was 15 February 2014 ('the third extension'). Subsequently, the plaintiff requested for a further extension to 15 March 2014 and on 20 February 2014, wrote to the first defendant with a proposal to pay the third payment on 28 February 2014. The first defendant rejected the plaintiff's proposal, terminated the SSA and forfeited the deposit on 27 February 2014. On 1 April 2014, the plaintiff deposited the third payment. However, the first defendant informed the plaintiff that the SSA

was terminated on 27 February 2014. The plaintiff disputed the termination of the SSA. The High Court granted an order of specific performance of the SSA in favour of the plaintiff ruling that the termination of the SSA by the first defendant was unlawful as the extended time frame for the payment of the third payment was, amongst others, not of the essence of the agreement. Hence, the appeal by the defendants. The question raised for the court's consideration was whether time was of the essence of the SSA after the expiry of due date for performance of the third payment.

Held (dismissing appeal with costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) In contract, where the phrase 'time is of the essence' is employed, the parties have clearly intended that the provisions dealing with time is an essential term of the contract. In this case, cl. 13 was quite clear and unambiguous as to its intent and meaning. It stipulated that 'Time whenever mentioned in this agreement shall be of the essence.' However, the very fact that cl. 13 provides that time is of the essence did not necessarily mean that time is of the essence. Whether in all the circumstances of the case it could be said that the parties intended that time to be of the essence for the performance of the third payment after the expiry of the third extension, was a question of fact to be determined by reference to the conduct and dealings of the parties. Hence, it was necessary to distinguish between the finding of a specific fact and a finding of fact, an inference from facts specifically found. (paras 23-26)

(2) The trial judge did not fall into error in finding that time had ceased to be of the essence based on the facts and circumstances of the case, including the conduct of the parties. There was no doubt that pursuant to cl. 13 of the SSA, time was originally of the essence of the contract, a position which was maintained even on 19 January 2014, in granting the third extension. However, once the time for completion was allowed to pass and the parties went on negotiating, time was no longer of the essence of the contract and it was incumbent upon the first defendant to give reasonable notice of its intention to abandon the contract if the third payment was not paid. (para 29)

(3) The termination of the SSA by the first defendant was unlawful. The first defendant should have given the plaintiff notice to effect the third payment within a reasonable time, failing which the first defendant shall be entitled to forthwith terminate the SSA. The first defendant did not give the plaintiff any notice of its intention to terminate the SSA. Instead, the first defendant terminated the SSA peremptorily, just a day before the date which the plaintiff had proposed to pay the third payment. As the termination of the SSA was unlawful, it must follow that the SSA was valid and subsisting contract. (para 30)

(4) There was no bad faith by the plaintiff which should disentitle it to the remedy of specific performance. There was no evidence to show that the plaintiff did not come with clean hands. Further, the defendants were estopped by their own conduct in negotiating with the plaintiff once the time for the performance of the third payment was over. In the circumstances of the case, damages were not an adequate remedy as the subject matter of the SSA was the shares. The trial judge had correctly applied the legal principles to the facts of the case and the plaintiff was entitled to the remedy of specific performance. (para 31)

Bahasa Malaysia *Headnotes*

Perayu kedua ('defendan kedua'), sebuah syarikat sendirian berhad dan pemilik berdaftar dan benefisial dua bidang tanah ('tanah-tanah tersebut') adalah anak syarikat milik penuh perayu pertama ('defendan pertama'). Defendan pertama memiliki kesemua modal saham terbitan dan berbayar berjumlah satu juta saham biasa ('saham-saham') dalam defendan kedua dan mempunyai kawalan mutlak terhadap pentadbiran dan urusan defendan kedua termasuk tanah-tanah tersebut. Menurut perjanjian jualan saham ('PJS'), responden ('plaintif') bersetuju menjual dan defendan pertama bersetuju untuk membeli kesemua saham atas terma-terma dan syarat-syarat yang terkandung dalamnya. Selepas bayaran pertama sejumlah 2% harga belian menurut kl. 3.3(a) PJS oleh plaintif, pihak-pihak memasuki PJS pada 23 Oktober 2013. Pada 4 November 2013, plaintif membuat bayaran kedua menurut kl. 3.3(b) PJS dan meneruskan untuk mendaftar kaveat persendirian atas tanah-tanah tersebut. Bayaran ketiga perlu dibayar pada 15 Februari 2013. Walau bagaimanapun, atas permintaan plaintif, tarikh bayaran ketiga dilanjutkan sebanyak tiga kali oleh defendan pertama dan tarikh lanjutan terakhir ialah pada 15 Februari 2014 ('lanjutan ketiga'). Kemudian, plaintif meminta lanjutan masa yang berlebihan sehingga 15 Mac 2014 dan pada 20 Februari 2014 menulis surat kepada defendan pertama dengan cadangan untuk membuat bayaran ketiga pada 28 Februari 2014. Defendan pertama menolak cadangan plaintif, menamatkan PJS dan merampas deposit pada 27 Februari 2014. Pada 1 April 2014, plaintif mendepositkan bayaran ketiga. Walau bagaimanapun, defendan pertama memaklumkan pada plaintif bahawa PJS telah ditamatkan pada 27 Februari 2014. Plaintif mempertikaikan penamatan PJS. Mahkamah Tinggi memberikan perintah pelaksanaan spesifik PJS berpihak pada plaintif memutuskan bahawa penamatan PJS oleh defendan pertama tidak sah kerana tempoh masa yang dilanjutkan bagi bayaran ketiga dibuat, antara lain, bukan inti pati perjanjian. Oleh itu, rayuan ini oleh defendan-defendan. Persoalan yang berbangkit untuk pertimbangan mahkamah adalah sama ada masa adalah inti pati PJS selepas penamatan tarikh bayaran bagi pelaksanaan bayaran ketiga.

Diputuskan (menolak rayuan dengan kos)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Dalam kontrak, di mana frasa 'masa adalah inti pati' digunakan, pihak-pihak jelas meniatkan peruntukan berkaitan dengan masa adalah terma inti pati kontrak. Dalam kes ini kl. 13 amat jelas berkaitan dengan niat dan maksudnya. Ia menyatakan 'masa bilamana disebut dalam perjanjian ini mestilah menjadi inti pati.' Walau bagaimanapun, fakta bahawa kl. 13 memperuntukkan bahawa masa adalah inti pati tidak semestinya bermaksud masa adalah inti pati. Sama ada dalam kesemua hal keadaan kes ia boleh dikatakan pihak-pihak meniatkan masa adalah inti pati bagi pelaksanaan bayaran ketiga selepas tamat tempoh lanjutan ketiga, adalah persoalan fakta yang perlu ditentukan dengan rujukan pada tindakan dan urusan pihak-pihak. Oleh itu, adalah perlu untuk membezakan antara dapatan fakta spesifik dan dapatan fakta, satu inferens daripada fakta yang didapati secara spesifik.

(2) Hakim bicara tidak khilaf apabila mendapati masa bukan lagi inti pati berdasarkan fakta dan hal keadaan kes, termasuk tingkah laku pihak-pihak. Tidak diragui bahawa menurut kl. 13 PJS, masa adalah pada asalnya menjadi inti pati kontrak, satu kedudukan yang dikekalkan sehingga 19 Januari 2014, apabila memberikan lanjutan ketiga. Walau bagaimanapun, sebaik sahaja masa untuk penyelesaian dibenarkan berlalu dan pihak-pihak meneruskan dengan perbicangan, masa tidak lagi menjadi inti pati kontrak dan penting bagi defendan pertama memberikan notis munasabah mengenai niatnya untuk mengabaikan kontrak jika bayaran ketiga tidak dibuat.

(3) Penamatan PJS oleh defendan pertama tidak sah. Defendan pertama sepatutnya memberikan plaintif notis untuk membuat bayaran ketiga dalam tempoh masa munasabah, jika gagal, defendan pertama berhak meneruskan untuk menamatkan PJS. Defendan pertama tidak memberikan plaintif apa-apa notis mengenai niat untuk menamatkan PJS. Sebaliknya, defendan pertama menamatkan terus PJS, hanya sehari sebelum tarikh plaintif mencadangkan bayaran ketiga. Oleh sebab penamatan PJS tidak sah, kesannya, PJS adalah kontrak yang sah dan kekal.

(4) Tiada niat jahat oleh plaintif yang boleh menafikannya remedi pelaksanaan spesifik. Tiada keterangan menunjukkan plaintif tidak jujur. Selanjutnya, defendan-defendan diestop oleh tindakan mereka sendiri dalam meneruskan perbincangan dengan plaintif sebaik sahaja masa untuk pelaksanaan bayaran ketiga tamat. Dalam kesemua keadaan kes, ganti rugi bukan remedi yang mencukupi kerana perkara PJS adalah saham. Hakim bicara dengan betul mengguna pakai prinsip undang-undang pada fakta kes dan plaintif berhak pada remedi pelaksanaan spesifik.

Case(s) referred to:

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***
Barclay v. Messenger [1874] 43 LJ Ch 449 ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Capping Corporation Limited & Ors v. Aquawalk Sdn Bhd & Ors [2013] 1 LNS 574 CA ***(refd)***
Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***
Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***
Ganam Rajamany v. Somoo Sinnah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***
Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(refd)***
Koh Shey Guan v. Lee Kok Chan [1970] 1 LNS 51 FC ***(refd)***
Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd [1998] 4 CLJ 352 CA ***(refd)***
Pamaron Holdings Sdn Bhd v. Ganda Holdings Bhd [1988] 1 LNS 109 HC ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281 HC ***(refd)***
Siah Kwee Mow & Anor v. Kulim Rubber Plantations Ltd [1979] 1 LNS 93 HC ***(refd)***
Spenser v. Cali & Delonga [1980] ANZ Conv R 485 ***(refd)***
Stancorp Sdn Bhd v. Abadi Utama Development Sdn Bhd & Ors [2000] MLJU 309 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC ***(refd)***
Thornton v. Basset [1975] VR 407 ***(refd)***
Tilley v. Thomas LR 3 Ch D 61 ***(refd)***
Webb v. Hughes [1870] LR Eq 281 ***(refd)***
Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] 1 LNS 201 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 56(2)
Rules of the Court of Appeal 1994, r. 8
Specific Relief Act 1950, s. 11(1)(c)

Other source(s) referred to:

KE Lindgren, *Time In The Performance of Contracts,* 2nd edn, Butterworths, paras 627, 650

For the appellant - T Sudhar, Collin Goonting, Edward Kuruvilla & Winnie Chan; M/s Coolin Goonting & Assocs
For the respondent - Robert Low, CL Tan & Karen Yon; M/s Ranjit Ooi & Robert Low

[Editor's Note: For the High Court judgment, please see Selaman Sdn Bhd & Anor v. Pinang Sari Sdn Bhd [2016] 1 LNS 723 (affirmed).]

Reported by S Barathi

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JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This appeal relates to the decision of the High Court which ruled that
B the termination of the share sale agreement by the first defendant *qua* vendor was unlawful as the extended timeframe for the payment of the third payment was, amongst others, not of the essence of the agreement. Consequently the High Court granted an order of specific performance of the share sale agreement in favour of the plaintiff *qua* purchaser. This is the first and second
C defendants' appeal against the said decision.

The Salient Facts

[2] The background facts have been comprehensively set out in the written judgment of the learned judge. We will summarise the salient facts
D insofar as they relate to this appeal.

[3] The second defendant is a private limited company and is the registered proprietor and beneficial owner of two pieces of adjoining land (Lots 1915 and 2114) in the Mukim of Dengkil, Daerah of Sepang, Negeri Selangor ("the lands").

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[4] The second defendant is the wholly owned subsidiary of the first defendant. The first defendant holds the entire issued and paid-up share capital comprising of one million ordinary shares ("the shares") in the second defendant. The first defendant has ultimate control over the management and affairs of the second defendant including the lands.

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[5] Pursuant to a share sale agreement dated 23 October 2013 ("the SSA"), the plaintiff agreed to purchase and the first defendant agreed to sell all the shares for RM50,352,746.40 upon the terms and conditions therein contained. For convenience, we set out the sequence of events leading to the dispute between the parties in the following chronology:

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29 September 2013	The plaintiff paid the sum of RM1,007,054.93 being 2% of the purchase price to the first defendant pursuant to cl. 3.3(a) of the SSA ("the first payment").
23 October 2013	SSA entered into between plaintiff and the first defendant.
4 November 2013	plaintiff paid RM4,028,219.71 being 8% of the purchase price to the first defendant pursuant to cl. 3.3(b) of the SSA ("the second payment").

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5 December 2013	plaintiff registered a private caveat over Lot 1915.
7 February 2014	plaintiff registered a private caveat over Lot 2114.
15 December 2013	due date for payment of RM10,070,549.28 ("the third payment") pursuant to cl. 3.3(c).
29 October 2013	first defendant granted the plaintiff an extension of time to effect the third payment by 15 January 2014 ("the first extension").
10 December 2013	plaintiff acknowledged the granting of first extension.
15 December 2013	invoice issued by first defendant to plaintiff for the third payment and late payment interest charge of 8% per annum.
31 December 2013	plaintiff requested for date for payment of third payment falling due on 15 January 2014 to be extended to 31 January 2014 pursuant to cl. 3.3(c).
10 January 2014	first defendant granted the plaintiff an extension of time to effect the third payment by 29 January 2014 ("the second extension").
13 January 2014	plaintiff's solicitors wrote to first defendant's solicitors demanding for immediate delivery of 100,000 of the sale shares together with the duly executed transfer forms.
23 January 2014	plaintiff requested for payment of third payment to be extended to 15 February 2014.
29 January 2014	first defendant agreed to extend the due date for the payment of the third payment to 15 February 2014 ("the third extension"). First defendant reserved its rights to terminate the SSA and forfeit the deposit in the event of default in the payment of the third payment.
12 February 2014	meeting between representatives of both parties.
14 February 2014	plaintiff requested for further extension to 15 March 2014.
15 February 2014	due date for payment of third payment under the third extension.

18 February 2014	plaintiff forwarded copies of offer letter from co-funder to first defendant.
19 February 2014	meeting between representatives of both parties.
20 February 2014	plaintiff wrote to first defendant with a proposal to pay the third payment on 28 February 2014.
27 February 2014	first defendant rejected plaintiff's proposal to pay the third payment on 28 February 2014. First defendant terminated the SSA and forfeited the deposit.
1 April 2014	plaintiff's solicitors wrote to first defendant's solicitors informing that the plaintiff have deposited the third payment and asked if the first defendant would give the plaintiff "a written extension of one week from the date of receipt of your extension letter to effect the third payment pursuant to cl. 3.3(c)."
10 April 2014	plaintiff's solicitors wrote to first defendant's solicitor asking for first defendant's response.
15 April 2014	first defendant's solicitor wrote to plaintiff's solicitors informing that the SSA was terminated on 27 February 2014.
25 April 2014	plaintiff's solicitors wrote to first defendant's solicitors disputing the termination of the SSA by the first defendant.

Findings Of The High Court

[6] The findings of the learned judge may be summarised as follows:

(i) Time is not of the essence of the performance of the third payment on the following grounds:

(a) Based on cls. 13 and 3.3(c) of the SSA, time is only of the essence where the same is not provided for under the SSA and cl. 3.3(c) prescribes and limits for only one extension of time of up to 14 days. Since there are three extensions, cl. 13 is not applicable. In granting the extensions, the first defendant did not expressly stipulate that time was to be of the essence. As such, the extended dates do not come within the ambit of cl. 13 and are not essential to the *SSA (Capping Corp Ltd & Ors v. Aquawalk Sdn Bhd & Ors* [2013] 1 LNS 574; [2013] 6 MLJ 579, 586 (CA));

(b) Based on the following facts and circumstances of the case, including the conduct of the parties show that time was not intended and/or ceased to be of the essence:

(aa) A series of extensions of time granted by the first defendant had induced the plaintiff to believe that time was no longer of the essence (*Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor* [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281; [1992] 2 MLJ 68; *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146; [1993] 1 MLJ 113 (SC); *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746 (CA));

(bb) The parties have agreed that interest is to be levied in respect of the delay for payment of the instalments including the third party; the imposition of interest is adequate compensation for delay for payment (*Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 (FC));

(cc) The first defendant had allowed the first due date for payment of the third payment and the subsequent first, second and third extensions to pass without terminating the SSA. As the first defendant did not stipulate a new date for the payment of the third party, an inference can be drawn that the first defendant had elected to waive the time stipulated for the performance; and

(dd) The plaintiff did not remain silent when it encountered difficulties but took active steps to engage the first defendant to negotiate on the performance of the third party (*Webb v. Hughes* [1870] LR Eq 281; *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 LNS 201; [1969] 1 MLJ 245; *Berjaya Times Square (supra)*).

(ii) The termination of the SSA by the first defendant is unlawful. The fist defendant was not entitled to terminate the SSA as the SSA did not become voidable (s. 56(2) of the Contracts Act 1950).

(iii) The plaintiff is entitled to specific performance on the following grounds:

(a) The SSA is a valid subsisting contract;

(b) Damages is not an adequate remedy because the subject matter of the SSA is the first defendant's shares in the second defendant company (s. 11(1)(c) of the Specific Relief Act 1950; *Pamaron Holdings Sdn Bhd*

v. Ganda Holdings Bhd [1988] 1 LNS 109; [1988] 3 MLJ 346; *Stancorp Sdn Bhd v. Abadi Utama Development Sdn Bhd & Ors* [2000] MLJU 309);

(c) The evidence showed that the plaintiff was at all times ready and willing to perform the SSA (*Ganam Rajamany v. Somoo Sinnah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290 (FC); *Koh Shey Guan v. Lee Kok Chan* [1970] 1 LNS 51; [1971] 79, 81 (FC)); and

(d) The plaintiff produced sufficient and cogent evidence of private parties who are in the financial position to provide funds to assist the plaintiff to complete the purchase.

Submission Of Parties

[7] Counsel for the defendants advanced three main grounds to support the argument that time was of the essence notwithstanding the three extensions of time granted by the first defendant to the plaintiff.

[8] First, counsel argued that cl. 13 of the first defendant granted the extensions of time to the plaintiff, the first defendant had made it a point to retain its right to terminate the SSA in the event of default. Counsel also cited the Federal Court decision in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 (FC) to support the proposition that in commercial contracts, there is a *prima facie* acceptance that time would be of the essence. As such, even if cl. 13 was inapplicable, it was an implied term that time was to be of the essence as the SSA is a commercial contract.

[9] Second, counsel argued that the learned judge erred in law and in fact in finding that (i) there was no new date for the performance of the third payment and (ii) there was no prior notice given of the first defendant's entitlement to terminate the SSA. On point (i), counsel argued that the finding is inconsistent with the contemporaneous documents, in particular the first defendant's letters to the plaintiff dated 29 October 2013, 10 January 2014 and 29 January 2014, where the first defendant had expressly stipulated new dates for performance. The judge erred in finding that time is no longer of the essence of the SSA because the plaintiff took active steps to engage the first defendant to negotiate on the performance of the third payment. In fact, the first defendant did not waive its right but merely suspended the exercise of its right until 27 February 2014. There was no clear and unequivocal election by the first defendant to accept the plaintiff's request for a fourth extension of time to make the third payment before the first defendant rescinded the SSA (K E Lindgren, *Time In The Performance of Contracts*, 2nd

edn, Butterworths para. 627). The giving of an extension to a specified date does not destroy the essentiality of time (*Barclay v. Messenger* [1874] 43 LJ Ch. 449, 456; *Siah Kwee Mow & Anor v. Kulim Rubber Plantations Ltd* [1979] 1 LNS 93; [1979] 2 MLJ 191, 201; *Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd* [1998] 4 CLJ 352; [1998] 4 MLJ 169, 179). There is no limit on the number of extensions which can be given (*Spenser v. Cali & Delonga* [1980] ANZ Conv R 485 cited in K E Lindgren, *Time In The Performance of Contracts*, 2nd edn, Butterworths paras. 650. On point (ii), it was contended that the learned judge's finding is inconsistent with the first defendant's letters to the plaintiff dated 29 October 2013, 10 January 2014 and 29 January 2014 which clearly provided that the first defendant will exercise its right to terminate the SSA in the event of non-payment of the third payment by the extension date.

[10] Third, counsel argued that the provision of interest did not destroy the essentiality of the SSA. The *Berjaya Times Square*'s case relied by the learned judge is distinguishable on the facts. That case related to a liquidated damage clause in a building contract and not late payment interest. *Thornton v. Basset* [1975] VR 407, 420-421 was cited to support the proposition that an interest clause does not destroy the essentiality of them.

[11] On the issue of termination, the defendants' submission is that since the third payment was not made by the third extension date, the plaintiff breached its contractual obligations thereby entitling the first defendant to terminate the SSA pursuant to s. 56(1) of the Contracts Act 1950.

[12] On the issue of specific performance, the defendants' submission is that the plaintiff should be disentitled to the remedy of specific performance because the plaintiff had displayed bad faith and lack of *bona fides*; those who come to equity must do so with clean hands (*Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497; [1997] 2 MLJ 45 (FC)).

[13] In reply, counsel for the plaintiff argued firstly that cl. 3.3(c) of the SSA provided that any extension of time shall only be for an additional 14 days after the expiry date. However, in this case there had been more than one extension of time to effect the third payment. As such, the learned judge correctly construed cl. 3.3(c) and found that cl. 13 did not apply and that the extended time frames were outside the ambit of the SSA.

[14] Second, counsel for the plaintiff argued that the learned judge found, on the facts and circumstances including the conduct of the parties, that time was not intended and/or ceased to be of the essence. The learned judge had given four grounds for holding that time was not of the essence. Not all the four grounds were challenged by the defendants. The learned judge had also taken all the contemporary documents into consideration.

[15] Third, counsel argued that the first extension was granted voluntarily and unilaterally by the first defendant even though the plaintiff did not request for it. The first extension was granted because the first defendant knew that the plaintiff was going to procure financing. This is corroborated by the fact that at the meeting on 12 April 2014 which took place a few days before the third extension deadline, the first defendant asked for documents and it was only fair and reasonable for the plaintiff to come back with the documents. When the documents were supplied to the first defendant three days after the deadline expired, the first defendant did not object. There was a further meeting on 19 April 2014 wherein a representation was made that the payment date was brought forward from 15 March 2014 to 28 February 2014. However, the first defendant purported to terminate the SSA on 27 February 2014.

[16] Fourth, counsel argued that the series of extensions lead the plaintiff to believe that time was no longer of the essence (*Plenitude Holdings Sdn Bhd (supra)*).

[17] Fifth, counsel argued that in this case interest was stipulated to be payable. The first defendant's witness (DW1) admitted that the imposition of interest was adequate compensation for the delay in payment. As such, the learned judge was correct to apply the principles in *Berjaya Times Square (supra)* in coming to her findings.

[18] Six, counsel argued that the plaintiff did not remain silent but took steps to engage the first defendant to negotiate to complete the performance of the third payment. There were meetings before and after the expiry of the deadline and evidence of negotiations between the parties. As such, time was allowed to pass and the parties went on negotiating for completion, then time is no longer of the essence of the SSA (*Webb v. Hughes (supra)*).

[19] Lastly, counsel argued that the first defendant committed the initial breach under the SSA when the defendants failed to effect the proportional transfer of the shares in accordance with the payments made. This fact was admitted by DW1. Since the first defendant is a party in default, it is not entitled to exercise its rights under the SSA (*Berjaya Times Square (supra), Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489 (CA)).

Decision

[20] At the outset, we will address the last point raised by counsel for the plaintiff. In the High Court, the plaintiff had additionally contended that the termination of the SSA was also unlawful because the first defendant was allegedly the first to breach the SSA. Be that as it may, the learned judge did not make any finding on whether the first defendant committed the initial

breach of the SSA. Instead, the judge found that the termination of the SSA due to non-payment of the third payment was unlawful as time was not of the essence. We accordingly agree with the submission of learned counsel for the defendants that the plaintiff is seeking to vary the decision of the learned judge without having filed a notice of cross-appeal under r. 8 of the Rules of the Court of Appeal 1994. With respect, we think the last point is misconceived and the plaintiff is thereby precluded from raising this issue at the hearing of the appeal (*Kabushiki Kaisha Ngu v. Leisure Farm Corp Sdn Bhd & Ors* [2016] 8 CLJ 149; [2016] 5 MLJ 557 (FC)).

[21] We will now deal with the main points raised by the defendants. In our view the key issue to be determined is this: Whether time is of the essence of the SSA after the expiry of due date for performance of the third payment?

[22] The first issue relates to the construction to be given to cl. 13. In this connection, it is pertinent to advert to the following guidelines laid down by the Federal Court in *Berjaya Times Square (supra)* at para. [42]:

(i) in interpreting a private contract a court is entitled to look at the factual background to the transaction;

(ii) the factual background includes all material that was reasonably available to the parties;

(iii) any part of the background that is declaratory of subjective intent of the parties must be disregarded; and

(iv) the court should adopt an objective approach when interpreting a private contract.

[23] As a general rule, the time fixed for performance under a contract is determined by reference to the intention of the parties as expressed in the contract. It is generally accepted that in contracts where the phrase 'time is of the essence' is employed, the parties in these cases have clearly intended that the provisions dealing with time is an essential term of the contract. In this case, cl. 13 is quite clear and unambiguous as to its intent and meaning. It stipulates that 'Time whenever mentioned in this agreement shall be of the essence.' As such, the court must give effect to the plain meaning of the words. Accordingly, we do not agree with the learned judge's reasoning that the extended dates do not come within the ambit of cl. 13 because the new time frames are outside the ambit of the SSA and therefore not essential to the SSA.

[24] Be that as it may, the very fact that cl. 13 provides that time is of the essence does not necessarily mean that time is of the essence. The test to be applied in determining this question has been enunciated succinctly by our apex court in the following passages:

A Whether or not time is of the essence of a contract must depend on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at.

per Gunn Chit Tuan SCJ at p 295 in *Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejutureraan Sdn Bhd* [1990] 3 MLJ 287 (SC).

B … [W]hether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a clause making time of the essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is of the essence does not *ipso facto* result in time being of the essence.

C per Richard Malanjum CJSS at p. 478 in *Damansara Realty Bhd v. Tan Sri Khoo Teck Puat & Anor (supra).*

[25] Applying the principles enunciated above, it falls to be determined D whether in all the circumstances of the case, it can be said that the parties intended that time to be of the essence for the performance of the third payment after the expiry of the third extension. This is a question of fact to be determined by reference to the conduct and dealings of the parties.

[26] In this regard, it is necessary to distinguish between the finding of a E specific fact and a finding of fact which was really an inference from facts specifically found. Insofar as the finding of a specific fact is concerned, an appellate court is generally reluctant to reject a specific finding, particularly where the finding is founded on the credibility or bearing of a witness. However, an appellate court is entitled to form an independent opinion about F the proper inference of fact, subject only to the weight which should be given to the judge's opinion.

[27] We have considered the defendant's arguments and perused the judgment of the learned judge. We are not persuaded that the learned judge had misdirected herself on the evidence or failed to judicially appreciate the G evidence or made wrong inference from the facts or misapprehended the facts. In other words, we do not think that that the findings of the learned judge are plainly wrong.

[28] Apart from examining the oral evidence and contemporaneous documents, the learned judge took into account the following pertinent facts:

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(a) numerous extensions were granted by the first defendant to the plaintiff after the third payment became due;

(b) The parties agreed that interest is to be charged for the delay in payment of the third payment;

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(c) The first defendant issued an invoice dated 15 December 2013 for interest charge on late payment;

(d) DW1's admission that imposition of late payment interest is adequate compensation for delay in payment;

(e) The first defendant allowed the original contractual due payment date for the third payment, the first extension, second extension and third extension to pass without terminating the SSA;

(f) There were two meetings between the parties on 12 February 2014 and 19 February 2014; and

(g) The parties went on negotiating for completion of the third payment.

[29] We are not persuaded that the learned judge fell into error in arriving at her finding that time has ceased to be of the essence based on the facts and circumstances of the case, including the conduct of the parties. There is no doubt that pursuant to cl. 13 of the SSA time was originally of the essence of the contract. Even on 29 January 2014 in granting the third extension that position was maintained. But that had been waived by the conduct of the defendants. The correspondence and the dealings between the parties down to and including 20 February 2014 confirm this view. Time then was no longer of the essence of the contract. Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and it is incumbent upon the first defendant to give a reasonable notice of its intention to abandon the contract if the third payment was not paid (*Webb v. Hughes (supra); Wong Hup Sing (supra)*; *Tilley v. Thomas* LR 3 Ch D 61).

[30] For the foregoing reasons, we agree with the learned judge that the termination of the SSA by the first defendant is unlawful. The first defendant should have given the plaintiff notice to effect the third payment within a reasonable time failing which the first defendant shall be entitled to forthwith terminate the SSA. The first defendant did not give the plaintiff any notice of its intention to terminate the SSA. Instead, the first defendant terminated the SSA peremptorily, just a day before the date which the plaintiff had proposed to pay the third payment. As the termination of the SSA is unlawful, it must follow that the SSA is a valid and subsisting contract.

[31] In this connection, we do not agree with the submission of the defendants that there was bad faith displayed by the plaintiff which should disentitle it to the remedy of specific performance. There is no evidence to support their contention that the plaintiff did not come with clean hands. Further, the defendants are estopped by their own conduct in negotiating with the plaintiff once the time for the performance of the third payment was

over. In all the circumstances of the case, we agree with the learned judge that damages are not an adequate remedy as the subject matter of the SSA is the shares. We are satisfied that the learned judge correctly applied the legal principles to the facts of the case (see para. 6(iii)(a)-(c)) above) and that the plaintiff is entitled to the remedy of specific performance.

[32] Accordingly, by a unanimous decision the appeal is dismissed with costs. The judgment of the High Court is affirmed.